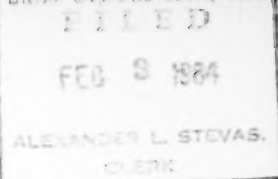


No. 83-128



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM GOUVEIA, *et al.*,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT PHILIP SEGURA

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ISSUES PRESENTED

1. Whether the Sixth Amendment requires appointment of counsel before indictment for an indigent prison inmate who is in administrative detention while under criminal investigation for a serious crime committed in prison.

2. Whether there was warranted a presumption of prejudice or showing of an actual prejudice or threat of prejudice to warrant dismissal of the indictment as the appropriate remedy for the deprivation of the Sixth Amendment right to counsel to such a prison inmate?

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	1
STATEMENT	1
A. Facts Of The Case	1
B. Investigative History Of The Case	4
C. Procedural History Of The Case	7
SUMMARY OF ARGUMENT	10
ARGUMENT	11
A. The Ninth Circuit Court Of Appeal's Decision Requiring That Counsel Be Appointed For An In- digent Prison Inmate Who Has Been Held Beyond The Maximum Administrative Detention Period Pending Investigation Or Trial For A Criminal Act Is A Natural Extension Of This Court's Teachings.	11
1. The Institution Of Adversary Judicial Proceed- ings In The Prison Setting Occurs When An Inmate Is Isolated Soley For Investigation For A Felony Or Trial For A Criminal Act	12
2. The Respondent Was Denied The Effective As- sistance Of Counsel At A "Critical" Pretrial Proceeding	19
3. The Decision Below Is A Logical Extension Of The Right To Counsel Guarantee And Protects Indigent Inmates In An Area Previously Sub- ject To Overreaching By The Prosecution ...	22
B. Dismissal Of The Indictment Is The Appropriate Remedy To Neutralize The Prejudice Suffered By Respondent	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	Page(s)
<i>Coleman v. Alabama</i> , 399 U.S. 1 (1970)	19
<i>Kirby v. Illinois</i> , 406 U.S. 682 (1972)	14, 15, 16
<i>Schneckloth v. Bustamonte</i> , 412 U.S. 218 (1973)	19
<i>United States v. Ash</i> , 413 U.S. 300 (1973)	12, 13, 14, 16, 20, 25
<i>United States v. Decoster</i> , 624 F.2d 196 (D.C. Cir. 1976)	21
<i>United States v. Duke</i> , 527 F.2d 386 (5th Cir. 1976) ..	24
<i>United States v. Gouveia</i> , 704 F.2d 1116 (9th Cir. 1983)	9, 11, 15, 18, 22, 23, 26, 27
<i>United States v. McLemore</i> , 447 F. Supp. 1299 (E.D. Mich. 1978)	24
<i>United States v. Morrison</i> , 449 U.S. 361 (1981) .	25, 26, 27
<i>United States v. Wade</i> , 388 U.S. 218 (1966)	12, 13, 14, 17, 19, 20
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	15
STATUTES:	
28 C.F.R. § 541.11 (1982)	18
28 C.F.R. § 541.20(b)	18
18 U.S.C. § 3281	23
OTHER:	
ABA Standards § 4.1 (2d ed. § 4-4.1)	21
U.S. Constitution Amend. VI	12

STATEMENT

A. Facts Of The Case

On November 11, 1978, an inmate named Thomas Trejo was stabbed to death in a cell at the Federal Correctional Institution of Lompoc, California. The death resulted from 45 separate stab wounds inflicted on his body with two different instruments. (R.T. 149-154)¹ .

According to the testimony of an inmate named Steven Kinard, who had originally been named as a co-conspirator to this murder, but who agreed to testify for the Government in exchange for a plea bargain to a reduced charge (which was later dismissed), Respondent Segura, along with Adolpho Reynoso, Robert Ramirez, William Gouveia and numerous other Mexican inmates, planned the murder of Thomas Trejo for several days prior to its perpetration. According to this same inmate's testimony, following the death of Thomas Trejo, the same defendants and conspirators discussed the details concerning how they had accomplished the murder of Thomas Trejo. Mr. Kinard further testified that he was asked by Defendant William Gouveia and another inmate named Willard Taylor to dispose of the murder weapons which had been used to kill Thomas Trejo and that he did in fact cooperate with these individuals to dispose of the weapons. (R.T. 531-562)

The Government also produced the testimony at the second trial of an inmate by the name of Gene Newby, who testified that, just following the time Mr. Trejo was murdered at the Federal Correctional Institution at Lompoc, Newby was in a cell with other prisoners when a

¹ R.T. refers to the Reporter's Transcript of the trial from which the appeal of the judgment of conviction was taken.

conversation ensued between those other prisoners and the defendants on trial. Newby testified that the defendants acknowledged they had killed Thomas Trejo and then they began disposing of the clothing they had worn during the murder, which has been stained with blood. (R.T. 1007-1031, 2433-2469)

The Government also produced at trial expert testimony that a shoeprint found on a locker in the cell where Mr. Trejo was murdered appeared similar in size, design and degree of wear to the shoe worn by appellant Segura several weeks after the murder. (R.T. 404-428) In addition, fingerprint identification on a sheet of paper at the murder scene established that the fingerprints of appellant Segura and defendant William Gouveia were on the sheet of paper. (R.T. 440-449)²

Each of the defendants in both trials offered the defense of alibi to the charges against them.³ In defense of Respondent Segura, he produced evidence both through himself and other witnesses that on the morning of the murder, prior to its alleged commission, he was busy playing handball in the prison recreation yard. (R.T. 1609-1612, 1594-1597) At the same time, inmate Kinard had testified that Segura and others were walking the prison track planning the murder of Thomas Trejo. (R.T. 509-513) During the critical hour that the murder was actually committed, Respondent Segura produced evidence that he was in the dormitory unit of the prison where he resided, which was a different unit from the one in which Mr. Trejo was murdered, watching a football

² No effort is made herein to specifically outline the proof offered by the Government against Respondent Segura's co-defendants, Reynoso, Ramirez and Gouveia.

³ See Joint Appendix, (p. 42)

game with other inmates. This testimony also showed that Respondent Segura remained continuously in his own unit until well after the murder of Thomas Trejo had occurred. (R.T. 1566-1570, 1577-1583, 1762-1771, 2147-2150)

With respect to the shoeprint found in the murder cell locker, Respondent Segura testified and produced further evidence that he arrived at Lompoc just two weeks before the murder and thereafter developed a foot problem and was issued a pair of Hushpuppy shoes, which were different from the prison issue shoes which were found imprinted on the locker where Trejo was found. (R.T. 2152-2153) The person who brought him the Hushpuppy shoes to wear from the prison supply section corroborated this as did the medical records of Respondent Segura from his prison file at the Federal Correctional Institution at Lompoc. (R.T. 1769, 2152)

With respect to the fingerprint on the sheet of paper in the cell where Thomas Trejo was found murdered, Respondent Segura offered testimony that in the immediate past (the last two weeks before the murder) he had been a resident of that unit where Mr. Trejo's body was found and that Segura had from time to time utilized stationery and touched various pieces of stationery located within the unit. (R.T. 2141)

In addition to the defenses of alibi offered by each of the defendants, several witnesses called by the defense testified that inmate Steven Kinard had told them, in the interval between the two trials of this case, that he (Kinard) and another inmate whose name was Michael Thompson had actually murdered Trejo. (R.T. 1883, 2061, 2209, 2554)

In addition, the defense offered the testimony of an expert in the science of hair examination, from the FBI Laboratory in Washington, who testified that, at the time of the death of Thomas Trejo, numerous Caucasian hairs were discovered on the garments worn by the decedent and the blanket which was covering his body. Numerous Mexican-type hairs, which could have matched appellant's Segura's or the other defendants, were found in the same locations, but none of them matched any of the defendants who were charged with the murder. (R.T. 1389-1407) The inmate named Michael Thompson, who died just prior to the indictment being returned in this case, was a blond Caucasian.

B. Investigative History Of The Case

Since the issue before this Court involves claims of prejudice resulting from the pre-indictment failure to appoint counsel for Respondent Segura and others, the Court will benefit from a detailed investigative history to better appreciate the lack of necessity for the twenty months that passed between the murder and the indictment.

1. On October 20, 1978, Respondent Segura arrived at Lompoc Federal Correctional Institution to serve a sentence for bank robbery. (R.T. 2137) (Joint Appendix, page 31)

2. On November 11, 1978, inmate Thomas Trejo was murdered at the Federal Correctional Institution at Lompoc, California.

3. Between November 11, 1978 and December 4, 1978, the authorities interviewed numerous inmates in an attempt to find out who perpetrated the murder of Thomas Trejo. During this time, one inmate, who did not testify at either of the two trials of this case, implicated

Respondent Segura as a perpetrator of the crime. (Joint Appendix, pp. 50-52)

4. On December 4, 1978, Respondent Segura was placed in the Isolation Unit at Lompoc Federal Correctional Institution for the commission of the murder of Thomas Trejo. At that time, a pair of prison workshoes being worn by Segura was taken from him for analysis and comparison to a shoeprint found on a locker in the cell where inmate Trejo was murdered. (R.T. 397-399) In addition, his fingerprints were at that time, and at all times prior and subsequent to that, available for analysis. (Joint Appendix, pp. 29-31) He remained in isolation until the Indictment in this case on June 17, 1980. (Joint Appendix, page 31)

5. On December 13, 1978, the Prison Disciplinary Hearing involving Respondent Segura's alleged involvement in the murder of Thomas Trejo was held and concluded. Segura requested an attorney to represent him at this hearing and to assist him in proving his innocence. That request was denied. Respondent Segura was then and on that date found guilty of the murder of Thomas Trejo by the Prison Disciplinary Board. (Joint Appendix, p. 38)

6. On March 22, 1979, the laboratory of the Federal Bureau of Investigation in Washington, D.C. conducted a fingerprint analysis attempting to match Respondent Segura's fingerprints to articles found in the murder cell where Thomas Trejo was murdered. (R.T. 472)

7. On April 10, 1979, the analysis of the footprint taken at the scene of the murder on November 11, 1978 and from Segura's shoe taken December 4, 1978 was conducted at the FBI laboratory in Washington. (R.T. 434)

8. On October 16, 1979, additional fingerprint analyses were conducted at the FBI laboratory in Washington. (R.T. 472)

9. On November 1, 1979, Respondent Segura was brought to the Federal Grand Jury in Los Angeles for the purpose of giving additional fingerprint exemplars to be used by the FBI laboratory in Washington to conduct additional fingerprint analysis. (R.T. Vol. B, 19-20)

10. In January, 1980, additional fingerprint analysis was conducted with the submitted fingerprints taken from Mr. Segura at the Grand Jury in November, 1979. (R.T. 472)

11. On June 17, 1980, the Indictment against Respondent Segura and the other co-defendants was returned by the Federal Grand Jury for the Central District of California (Joint Appendix, p. 4)

12. On September 9, 1980, the Government's chief witness against Respondent Segura, Steven Kinard, who himself was a co-defendant in the Indictment for conspiracy to commit murder, volunteered his services to the Government as a witness against his co-defendants in exchange for a plea to a reduced charge. (R.T. 740-743)

13. In January, 1981, after the first trial had resulted in a mistrial, Gene Newby, another critical witness against appellant Segura, was recruited as a witness for the United States in the retrial of appellant Segura and his co-defendants. (R.T. 1075-1079)

14. In April, 1979, an inmate by the name of Robert Carillo died of natural causes. Not knowing of Carillo's death until just prior to the first trial, Carillo was listed as an alibi witness by respondent Segura in the Notice of Alibi given prior to the first trial. (Joint Appendix, pp. 42-43, 78) Segura later testified that Carillo was one of the

inmates with whom he ate morning breakfast on the day of the Trejo killing at the very time that Steven Kinard testified that Segura and his co-conspirators were arranging for the murder of Trejo while walking the athletic track of the prison. (R.T. 2145-2146)

15. In June, 1979, Michael "Flappers" Thompson, another inmate at the Lompoc Federal Correctional Institution, died of natural causes. (R.T. 2228) The evidence at trial, through the testimony of numerous witnesses, showed that Thompson was one of the potential perpetrators of the murder of Thomas Trejo, along with Steven Kinard.

16. Gary Lowe, another inmate at the Lompoc Federal Correctional Institution, was also listed by Respondent Segura as one of the alibi witnesses who was present with Segura in his unit during the time of the Trejo killing. Inmate Gary Lowe died in January, 1980 of natural causes. (Joint Appendix, pp. 42-4,3, 78)

C. Procedural History Of The Case

Prior to the commencement of the first trial, Respondent Segura and co-respondents filed a motion to dismiss the indictment on multiple grounds. The motion was premised upon the prejudicial effects of the lengthy 20-month delay from the time the murder was committed until the defendants were indicted and appointed counsel. The motion was founded upon the right of a defendant to due process of law under the Fifth Amendment and to be free from a prejudicial pre-indictment delay. It was also founded upon the deprivation of rights under the Sixth Amendment to counsel and to a speedy trial.

With respect to the Sixth Amendment violation and the other resulting prejudices highlighted in the Fifth Amendment deprivations, Respondent Segura pointed

out that the tardy appointment of counsel some 20 months after the offense in question rendered it virtually impossible to properly investigate the underlying facts of the case and mount a proper defense. (Joint Appendix, pp. 39-43, 78) Among the allegations listed in the motion was the inability to locate witnesses, some of whom were no longer alive and many of whom were disbursed throughout the prison system or had already been released from prison. The difficulties as presented were made more severe by the fact that most prison inmates know each other only by nicknames and once dispersed are impossible to locate. In addition, the lengthy time between the offense and the appointment of counsel resulted in a finding by counsel that even for those inmates who could be located as witnesses, their memories were severely dimmed as to the relevant facts of the case.

The motion also highlighted that the defendants were hampered in their own ability to investigate the case and hence assist the later appointed counsel because the defendants themselves were in an isolated status for some 20 months and had no access to the general prison population from which population would come the potential witnesses in their case. Thus, respondent and his co-defendants lacked the ability to conduct their own personal investigation, find potential witnesses as to their whereabouts at the time of the offense or to attempt to locate other persons who might have been responsible for the death of Thomas Trejo.

The District Court denied the motion and Respondent Segura and his co-defendants proceeded to trial. The first trial (which lasted approximately 4 weeks) resulted in a mistrial when the jury was unable to reach a verdict. At a re-trial of the case, a second jury returned verdicts of guilty against Respondent Segura and his co-defendants

for the murder of Thomas Trejo and for conspiracy to commit that murder.

In appealing the conviction, Respondent Segura raised numerous issues before the United States Court of Appeal for the Ninth Circuit. Among those were the issues raised in the motion to dismiss the indictment referred to above. In addition, appellant Segura raised issues relating to the failure of the government to disclose an alibi rebuttal witness which it called for testimony in the second trial. Other objections relating to evidentiary rulings at trial were raised in the appeal before the Ninth Circuit.

After the submission of briefs and oral argument on all of these issues, the Court of Appeal, on its own motion, ordered an *En Banc* hearing on the limited issue of the applicability of the Sixth Amendment right to counsel to prison inmates who are held in isolation for lengthy periods of time prior to being indicted for a criminal offense. At the time this *En Banc* hearing was ordered the case of *United States v. Mills and Pierce* was consolidated for consideration of this issue only.⁴

The Ninth Circuit Court of Appeal, in an opinion reported at 704 F.2d 1116, reversed the convictions of Respondent Segura and his co-defendants as well as those of Mills and Pierce on the grounds that there had been a prejudicial denial of the Sixth Amendment right to counsel for all of these prison inmates who had been held in isolation without counsel or the ability to investigate their case prior to indictment. The Court of Appeal analyzed the history of the applicability of the right to counsel as it had been set forth by the United States Supreme Court

⁴ Issues pertaining to pre-indictment delay and other appellate issues were never decided by the Ninth Circuit.

and concluded that in prison crimes the right to counsel should attach to an inmate held in isolation for a period in excess of 90 days, because such an inmate was invariably being held in that category for purposes of future indictment for a criminal offense. In analyzing the remedies available for such a deprivation of a constitutional right as this, the Court concluded that the only potential remedy was that of dismissal of the indictment, since the prejudice resulting from the failure to provide counsel to such an inmate was pervasive.

Subsequently, the United States petitioned this Court for a writ of certiorari, which on October 17, 1983, was granted.

SUMMARY OF ARGUMENT

The Court of Appeal held that an indigent prisoner held in administrative detention past ninety (90) days must be appointed counsel on request, or a subsequent indictment against him for a prison crime was subject to dismissal.

As more fully set forth below, the decision of the Court of Appeal was a logical extension of the teaching of the Supreme Court in its application of the rules pertaining to the Sixth Amendment right to counsel. Moreover, the remedy of dismissal of the instant indictment was the only practical remedy in view of the prejudices suffered by Respondent Segura and his co-Respondents.

ARGUMENT

A. The Ninth Circuit Court Of Appeal's Decision Requiring That Counsel Be Appointed For An Indigent Prison Inmate Who Has Been Held Beyond The Maximum Administrative Detention Period Pending Investigation Or Trial For A Criminal Act Is A Natural Extension Of This Court's Teachings.

This case presents this Court with an opportunity to examine the application of the right to counsel under the Sixth Amendment of the Constitution in the context of the prison setting. The Court of Appeal, faced with a question of first impression unique to prison crimes, fashioned a rule of accommodation which will protect the government's legitimate prison security interests and yet preserve the indigent inmate's Constitutional right to counsel.

The Court of Appeal concluded that inmates, held in administrative detention beyond the ninety (90) day maximum disciplinary period, must ask for an attorney, establish indigency, and then be allowed to make a prima facie showing that their continued presence in isolation is due, at least in part, to a pending investigation for a felony. If the inmate can carry the burden and establish the aforementioned requirements, then prison officials must refute the inmate's showing by demonstrating that continued isolation is necessary for security reasons, appoint counsel, or release the inmate back into the general prison population. 704 F.2d at 1124. The rule fashioned by the Court of Appeal assures that any continued detention is for investigative purposes only and thus fixes a point in time when the initiation of adversary judicial proceedings attaches in the prison context.

1. The Institution Of Adversary Judicial Proceedings In The Prison Setting Occurs When An Inmate Is Isolated Solely For Investigation For A Felony Or Trial For A Criminal Act.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Historically, the Sixth Amendment counsel guarantee has been given an expansive reading.

"The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when *new contexts* appear presenting the same dangers that gave birth initially to the right itself." *United States v. Ash*, 413 U.S. 300, 311 (1973) (emphasis added).

In its opening brief for Petitioner, the Solicitor General claims that the opinion of the Court of Appeal is a "radical departure from the decisions of this Court." In asserting this view, the Solicitor General has ignored the historical development and expansive reading given the right to counsel guarantee, and has erroneously asserted a position that would stifle a defendant's right to counsel "whenever necessary to assure a meaningful defense." *United States v. Wade*, 388 U.S. 218, 225 (1966). In order to apply the Sixth Amendment as it was intended by the original drafters, one must examine the circumstances raising the issue in light of the Sixth Amendment's historical development.

"The right to counsel in Anglo-American law has a right historical heritage, and this Court has regularly drawn on that history in construing the counsel guarantee of the Sixth Amendment." *United States v. Ash*, 413 U.S. at 306.

Under the common law of England, which was brought to the American colonies, the typical criminal prosecution

was conducted by a private prosecutor. The American judicial system, in apparent response to the lack of lawyers, adopted the institution of the public prosecutor. As a result "the accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncracies of juries, and . . . the personnel of the court." *United States v. Ash*, 413 U.S. at 308 (citation omitted). In recognition of this prosecutorial force, which created an imbalance in the adversary system, the American judicial system developed and recognized the accused's right to counsel.

Throughout the years, this Court has maintained a flexible approach when applying the Sixth Amendment's right to counsel guarantee, in order to compensate for the imbalance in the adversary system resulting from the creation of the office of the public prosecutor. Each pre-trial confrontation has been individually examined in light of the purpose for which the Amendment was passed. The Court in *United States v. Ash*, 413 U.S. 300, 310-11 (1973), noted the progressive nature of the right to counsel and the need to avoid the application of a static interpretation of this essential right. The court wrote:

"This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. In *Wade*, the Court explained the process of

expanding the counsel guarantee to these confrontations:

“ ‘When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to ‘critical’ stages of the proceedings 388 U.S., at 224, 87 S.Ct., at 1931 (footnote omitted).’ ”

This case presents a variation on the normal course of criminal proceedings, because the confrontation between the prosecutorial forces and the defendants, all of whom were inmates held in isolation, occurred before defendants had been indicted. The Solicitor General cites *Kirby v. Illinois*, 406 U.S. 682 (1972), in support of its argument that no right to counsel attaches until the initiation of adversary judicial proceedings, a point which the Solicitor General identifies as the time of indictment. However, neither *Kirby*, nor any of the cases cited therein, dealt with the confinement of a prisoner and when his right to counsel should attach. The initiation of the adversary judicial proceeding as envisioned in *Kirby* was determined to be the point in time when the right to counsel should attach to *free* citizens in order to adequately protect their constitutional rights. The opinion in *Kirby* was not designed with the prison environment in mind and thus cannot be mechanically applied to such a situation without some modification.

Different evaluations must be conducted when our attention is drawn to the prison setting and the Constitutional rights of inmates. The Court in *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974), recognized the very different circumstances confronting prisoners and concluded:

"... [O]ne cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison."

In keeping with the continuing evolution of the Sixth Amendment, the Court of Appeals, in the instant case, faced with a unique pre-trial confrontation involving prisoner's rights to counsel, fashioned a rule based upon the prison regulations which would once again restore the balance in the adversary system.

Although, in the vast majority of cases, arrest or indictment do in fact mark the initiation of adversary proceedings, and are not "a mere formalism," *Kirby v. Illinois*, 406 U.S. at 689, that triggers the application of the Sixth Amendment rights, the Court of Appeal noted the unique position vis-a-vis the prosecution, which faces an inmate who is suspected of a prison crime.

"Formal charges need not be brought until the government is ready for trial because the suspect can be isolated without being arrested. To insist that an inmate is not 'accused' until formal charges are initiated is to ignore reality." 704 F.2d 1122.

It is important to note that the *Kirby* plurality, which the Solicitor General relies upon in asserting his position that isolation pending trial can never be an accusation, identified the initiation of judicial proceedings as the point when the government has committed itself to prose-

cute, and the adverse positions of the parties have solidified. "It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra*, 406 U.S. at 689. Thus, if the adverse positions of the parties have solidified at some point earlier than arrest or indictment and the defendant has been faced with the prosecutorial forces of the government, then *Kirby* certainly suggests that the right to counsel attaches at that time, despite the absence of any formal procedures. The *Kirby* plurality opinion can thus be read as holding that the right to counsel attaches at a point in time *no later than* the initiation of adversary judicial proceedings.⁵

Giving the *Kirby* decision this flexible reading rather than the rigid, unbending reading expressed by the Solicitor General will promote the purpose for which the Sixth Amendment was passed and provide a basis for future growth and adaptability. In order to determine whether the right to counsel attaches to a particular event, there must be an "examination of the event[s] in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v. Ash*, 413 U.S. 300, 313 (1973). Given the complexities of each new confrontation between the government and the accused, and the constant need to maintain a balance in the adversarial system, it would be a misguided endeavor to engrave in stone any rules for the application of the right to counsel.

⁵ Justice Brennan, Marshall and Douglas, who joined in dissenting, would have attached the right to counsel at an even earlier stage.

In *United States v. Wade*, 388 U.S. 218, 224 (1967), this court remarked:

"[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings. . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defense.' ". . . the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (footnote omitted).

The initial stages of investigation in the present case were such a 'critical stage' of the proceedings, and counsel's absence did in fact derogate from the accused's right to a fair trial. Respondent Segura and his three co-defendants were placed in solitary confinement for almost two years without the assistance of counsel, despite repeated requests, while the government and F.B.I. slowly and methodically conducted their investigation and prepared their case for trial. It was during these early months that witnesses' memories were most distinct. It was in this period that the Government interviewed hundreds of inmates and found those it would use to later (much later) seek an indictment. The defendants were completely deprived, by virtue of their isolation from the general prison population and the absence of legal assistance, to conduct a similar investigation. During the first months of solitary confinement, prison officials conducted a disciplinary hearing at which time respondent was found guilty of the murder of Thomas Trejo. As a result of this prison hearing, respondent was sentenced to solitary confinement pending the Government's investigation.

Federal prison regulations provide, as the Court of Appeal noted, that the maximum stay in isolation for

disciplinary purpose is 90 days. C.F.R. § 541.11 (1982); 704 F.2d 1124. "Federal prison regulations [also] specify that administrative detention can only continue indefinitely where the detention is in contemplation of a criminal prosecution." *Id.* And finally, the prison regulations require the Warden to "prepare a memorandum detailing the reasons for placing an inmate in administrative detention, with a copy given to the inmate." 28 C.F.R. § 541.20(b). Yet despite these detailed procedures, prison authorities continued the solitary confinement of respondent and his co-defendants for seventeen (17) months beyond the maximum three-month disciplinary period, and failed to prepare or provide respondent with a memorandum stating the reasons for his continued confinement. This clearly suggests that the seventeen (17) months of confinement beyond the ninety (90) day maximum disciplinary period was in contemplation of criminal prosecution, which was presumed by the Court of Appeal and never refuted. The attempt now made by the Solicitor General to utilize these prison regulations as a justification for the lengthy isolation of these defendants is misleading in that none of the aforementioned procedures for lengthening the isolation was employed, and no proper ground existed for lengthening the isolation. The purpose and only purpose for keeping these inmates in isolation was to keep them from the general prison population where these inmates could potentially suborn perjury concerning the crime in question. See Petitioner's Brief, pp. 26-27. Thus, under the guise of preventing subornation of perjury, the Government in effect has justified depriving an inmate of any right to investigate the case on his own.

Since respondent had been found guilty of the murder by prison authorities and was suffering a significant loss of his liberties and the ability to investigate his own case

due to his lengthy confinement pending criminal investigation, it is clear that the adverse positions of the parties had solidified, the initiation of the adversary proceedings had begun and the right to counsel had attached all prior to the formal indictment.

2. The Respondent Was Denied The Effective Assistance Of Counsel At A "Critical" Pretrial Proceeding.

This court has consistently held that the right to counsel attaches at any "critical" pretrial proceeding. *United States v. Wade*, *supra*, 388 U.S. at 224. A "critical" stage of the proceeding occurs whenever counsel's presence is necessary "to protect the fairness of the trial itself." *Schneckloth v. Bustamonte*, 412 U.S. 218, 239 (1973); *Cf.*, *Coleman v. Alabama*, 399 U.S. 1, 17-18 (1970), (Stewart, J., dissenting). As noted by the Court of Appeal, respondents clearly lacked a meaningful defense at trial as a result of being denied the aid of counsel for nearly two years. While the government and F.B.I. gathered testimony and preserved evidence, Respondent was forced to sit in solitary confinement without the aid of counsel.⁶ Twenty months later the Government lethargically completed its thorough investigation and indicted Respondent. Only then was Respondent appointed counsel. However, at this point, the "critical" initial stages of investigation were forever lost to Respondents. Memor-

⁶ It must be noted that a non-indigent inmate placed in solitary confinement is permitted to hire counsel at the initial stages of the government's investigation in order to preserve his right to a fair trial. Respondent's lack of effective assistance of counsel and his resultant unfair trial were due solely to his indigency.

Further, an indigent inmate held in disciplinary segregation has no opportunity whatsoever to gather or preserve evidence once the disciplinary proceedings are concluded and his need for counsel truly becomes apparent.

ies had faded, witnesses were lost or had died and physical evidence essential to respondent's case had deteriorated. (See Appendix A, pages 79-82)

Although the Court in *United States v. Ash*, 413 U.S. 300 (1973), concluded that the right to counsel does not necessarily apply to the prosecutor's trial preparation interviews with witnesses or to photographic displays, it based this holding on the existence of the following parity:

"The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

"That adversary mechanism remains as effective for a photographic display as for other parts of pre-trial interviews. No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution." 413 U.S. at 318 (footnote omitted).

This balance in the adversarial system caused the confrontation in *Ash* to not be "critical." However, if this traditional counterbalance in the American adversary system is upset by the inability of defense counsel to seek and interview witnesses himself, then the pretrial confrontations become "critical." Respondents in the present case lost this equality of access to witnesses by being held in isolation without counsel for twenty (20) months while the government took full advantage of the prejudicial disparity and reduced respondent's trial "to a mere formality." *United States v. Wade*, 388 U.S. at 224.⁷

⁷ The continued reference by the Government to the fact that these defendants and a fifth inmate charged called fourteen (14) alibi witnesses is misleading. These fourteen witnesses were not all called by

There can be little doubt that the presence of counsel could have averted the prejudicial effect of the lengthy detention and assured a meaningful confrontation at trial. "[I]nvestigation and preparation are the keys to effective representation. . . . It is impossible to overemphasize the importance of appropriate investigation to the effective and fair administration of criminal justice." ABA Standards at 225. See ABA Standards § 4.1 (2d ed. § 4-4.1) (Duty to Investigate) By denying respondents the appointment of counsel at the critical initial stages of investigation, the government has violated the very essence of the Sixth Amendment guarantee.

Proper investigation by both sides is crucial in maintaining the balance of the adversary system.

"First, the proper functioning of our adversary system demands that both sides prepare and organize their case in advance of trial. There can be no justice where one party to the battle [is prevented from] arm[ing] itself with the pertinent facts and law. Second, in a very practical sense, cases are won on the facts. Proper investigation is critical not only in turning up leads and witnesses favorable to the defense, but in allowing counsel to take full advantage of trial tactics such as cross-examination and impeachment of adverse witnesses. And of course, adequate legal investigation is necessary to ensure that all available defenses are raised and the government is, put to its proof." *United States v. Decoster*, 624 F.2d 196, 277-78 (D.C. Cir. 1976) (Bazelon, J., dissenting) (footnotes omitted).

one defendant, but divided among them. Moreover, in the pretrial and trial proceedings, counsel proved that there were other alibi witnesses who could not be called because they were known only by nicknames, had dispersed to other prisons or been released from custody, or had died. Also lost through natural death was an alternate suspect, Michael Thompson.

The Court of Appeal held that respondent's lack of counsel during the "critical" initial stages of investigation unconstitutionally obstructed the ability of respondent to receive a fair trial. Viewed in the light of the historical development of the Sixth Amendment, and this Court's previous decisions, the Court of Appeal's decision is a logical extension of the counsel guarantee and should be upheld.

3. The Decision Below Is A Logical Extension Of The Right To Counsel Guarantee And Protects Indigent Inmates In An Area Previously Subject To Overreaching By The Prosecution.

The Court of Appeal held that if an inmate is confined in isolation for more than 90 days, the maximum disciplinary period provided for in the prison regulations in the absence of properly sought extensions, he should be permitted to demonstrate, and in fact it is presumed, that his continued presence in isolation is due to a pending investigation or trial for a criminal act. *United States v. Gouveia*, 704 F.2d 1116, 1124 (9th Cir. 1983). In order to avoid the potential for abuse which may arise by extending the right to counsel to such indigent inmate detainees, and in recognition of the prison's legitimate need to protect the security of the institution and its inmates, the Court of Appeal delineated specific procedures which must be met before an indigent inmate is constitutionally entitled to appointed counsel. The Court held:

"The inmate must ask for an attorney, establish indigency, and make a prima facie showing that one of the reasons for continued detention is the investigation of a felony. At this point prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population." *Id.*

By couching its holding in the aforementioned terms, the Court of Appeal has permitted the continued detention of an inmate for legitimate prison disciplinary reasons, thus safe-guarding the integrity of the internal prison system, and yet recognized the indigent inmate's constitutional right to counsel when he has for all practical purposes been charged with a federal crime.

Prior to the decision of the Court of Appeal, the Government, faced with circumstances such as those in the instant case, would actually assume the role of an adversary vis-a-vis the prisoner, without having to comply with the constitutional procedures which follow when that adversarial role is formalized by an indictment or information. Thus, in effect, the Government can functionally accuse in the prison context and then delay the attachment of the prisoner's constitutional rights indefinitely while it builds its case.* As the Court below noted, "when detention is ordered as a disciplinary measure or to prevent disorder it is indeed a matter of internal prison administration. But when used to isolate an inmate pending trial both its purpose and effect is accusatory." 704 F.2d at 1123. In light of this observation, the Court of Appeal fashioned a rule to give effect to the right to counsel in the prison context, in order to avoid clear overreaching when committed by the Government, as in the instant case.

The reasoning of the Court of Appeal is consistent with the historical development of the Sixth Amendment and

*The Court should be mindful that in murder prosecutions, the accused is without the added protection of a statute of limitations. See 18 U.S.C. § 3281. Thus, if a detainee is left without protection such as that called for by the Court of Appeal, he could be without counsel for years prior to indictment.

with the decisions of other Courts who have examined the application of the Sixth Amendment in the prison context.

In *United States v. Duke*, 527 F.2d 386 (5th Cir. 1976), the defendant inmate was held in administrative segregation for 35 days. The Court examined this detention period under traditional Sixth Amendment right to speedy trial analysis, and concluded that the Sixth Amendment was not triggered because administrative segregation was "[u]sed as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from members of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population" *Id.* at 390. However, the Court noted that this conclusion was based on the fact that ". . . administrative segregation accompanying the breach of a prison regulation [was] in no way related to or dependent on prosecution by the Federal Government of an inmate for that same offense as a violation of federal criminal law." *Id.*

Thus, when the administrative segregation goes beyond serving a purely internal disciplinary function and is used for reasons related to or dependent upon prosecution by the Federal Government, the segregation is tantamount to an accusation. *See also United States v. McLemore*, 447 F. Supp. 1229, 1235-36 (E.D. Mich. 1978) (Sixth Amendment right to speedy trial triggered by placement in administrative detention since purpose of detention was to answer for criminal charges and not for purely institutional reasons). Consistent with these decisions, the Court below fashioned a rule which provided an indigent inmate with the opportunity to demonstrate that his continued detention is related to or dependent on a pending criminal prosecution.

As noted previously, an interpretation of the Sixth Amendment cannot be engraved in stone. The right to counsel guarantee must be expanded to those situations which "appear presenting the same dangers that gave birth initially to the right itself." *United States v. Ash*, 413 U.S. at 311. The Court below noted the potential for overreaching by the prosecution in a lengthy detention, thus creating an imbalance in the adversary system. To remedy this imbalance, the Court of Appeal extended the right to counsel under limited circumstances, and brought the adversary system into a constitutional balance.

B. Dismissal Of The Indictment Is The Appropriate Remedy To Neutralize The Prejudice Suffered By Respondent

The Solicitor General argues that, even assuming there has been a Sixth Amendment violation, dismissal of the indictment is an inappropriate remedy in the absence of any specific showing of prejudice.

The Court of Appeal, in fashioning a remedy commensurate with the deprivation charged, construed the prejudice suffered by respondent in the instant case in light of the recent decision in *United States v. Morrison*, 449 U.S. 361 (1981). In *Morrison* this Court examined the possibility of dismissal in the event of a violation of the Sixth Amendment's right to counsel. This Court adopted the following approach in order to aid in the selection of a proper remedy: "[o]ur approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. The Court went on to note that if there were demonstrable prejudice or even the substantial threat thereof, then dismissal of the indictment would be appropriate. *Id.*

The Court of Appeal concluded that the instant case presented a compelling set of circumstances which justified the remedy of dismissal. The denial of counsel to respondent during the initial critical stage of investigation, while the events surrounding the murder were fresh in the minds of all those involved, and for the twenty months thereafter, so permanently prejudiced respondent's defense that a fair trial could not be had. "Here, however, Government conduct has rendered counsel's assistance to [respondent's] . . . ineffective and the resulting harm is not capable of after the fact remedy . . . [h]ere . . . the only certain remedy is to dismiss the indictments against them." 704 F.2d 1126.

Keeping in mind the teachings of the Supreme Court, that courts must be "responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective," *United States v. Morrison, supra*, at 364, and in order to neutralize the substantial, permanent prejudice suffered by respondent, the Court below was left with no alternative but to dismiss the indictment.

Contrary to the claims by the Solicitor General that the Court dismissed the indictment based on a presumption of prejudice, the Court of Appeal stated: "Even without the presumption there is evidence that 'substantial prejudice' may have occurred in the instant case." 704 F.2d 1126. The respondents clearly demonstrated for the record the substantial prejudice suffered by them as a result of being denied counsel. Critical alibi witnesses and other crime suspects were lost during the inordinant delay through death or inability to be located. This fact in itself is sufficient to deny respondent a fair trial. A strong showing was made concerning the difficulties faced by counsel first appointed twenty (20) months after the

crime in locating witnesses, most of whom were known only by nicknames, and who had now been either scattered about the prison system or released from custody altogether. Moreover, as noted by the Court below, it was a significant fact that the Government was unable to rebut respondent's showing of potential prejudice. (See Joint App. 79-82)

This Court in *Morrison* noted that under the appropriate circumstances a substantial threat of demonstrable prejudice would warrant dismissal. In addition to making a showing of substantial prejudice, respondent demonstrated a substantial threat of demonstrable prejudice. Had counsel been appointed at the appropriate time, he could have preserved the physical evidence and testimony of witnesses necessary to assure a fair trial. However, under the circumstances of the instant case, the Court noted the potential of substantial prejudice which faces administrative detainees because "ordinarily it will be impossible adequately either to prove or refute its existence." 704 F.2d 1126. This inadequacy stems from the inmate being compelled to prove that his defense has been prejudiced by the irretrievable loss of exculpatory evidence, the very evidence which cannot now be determined due and owing to the lack of attorney assistance to preserve it. Thus, the Court below was correct in dismissing the indictment.

As a result of the foregoing demonstration, it is clear that the scales of justice weigh more heavily in favor of dismissal of the indictment in the instant case.

CONCLUSION

Respondents clearly were prejudiced by the deprivation of the effective assistance of counsel. As a matter of fashioning a remedy in this case, and also for policy

reasons attendant in other cases of serious prison crime, the effort by the Court of Appeal to construct a permanent rule which preserves both the integrity of prison security and the safeguards of the right to counsel under the Sixth Amendment should be sustained by this Court.

For the foregoing reason, the decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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